In this issue:

Income/Franchise: New Jersey Tax Court Holds that Individual S Corp Shareholders Can't Claim Credit for Certain Taxes Paid to Another State .................................................................................................................. 2
Income/Franchise: Oregon Supreme Court Holds that “Gross Receipts from Broadcasting” for Special Industry Apportionment Purposes Includes Interstate Broadcaster’s Receipts from Regular Business Transactions ........................... 4
Income/Franchise: Utah State Tax Commission Issues Guidance on State Tax Treatment of IRC Sec. 965 Deferred Foreign Income .......................................................................................................................... 4
Sales/Use/Indirect: Arkansas DFA’s Revenue Legal Counsel Comments on Wayfair, Explains that State Impact is Uncertain ............................................................................................................................................. 5
Sales/Use/Indirect: Minnesota Supreme Court Upholds Constitutionality of Subjecting Non-Resident Pharmacy to Legend Drug Tax, References Wayfair and other US Supreme Court Cases .................................................................................................................. 6
Sales/Use/Indirect: South Carolina DOR Proposes More Draft Post-Wayfair Nexus Guidance Involving Remote Sellers, Provides October 1 Enforcement Date for Local Jurisdiction Tax Purposes .................................................................................................................. 6
Multistate Tax Alerts ................................................................................................................................................. 7
**Income/Franchise:**

**Kentucky DOR Explains State Treatment of Federal 2017 Tax Act’s GILTI Provisions**

*Technical Advice Memorandum: KY-TAM-18-02, Ky. Dept. of Rev. (2018).* The Kentucky Department of Revenue (Department) has issued guidance on certain provisions of the federal 2017 Tax Act (i.e., P.L. 115-97) and how they impact state income taxation in Kentucky – specifically Kentucky’s income tax treatment of global intangible low-taxed income (GILTI). The Department references recently enacted legislation [H.B. 487, see previously issued Multistate Tax Alert for more details on this new Kentucky law; and H.B. 366, see previously issued Multistate Tax Alert for more details on this new Kentucky law], which includes updating Kentucky’s Internal Revenue Code (IRC) conformity date to apply to the IRC as in effect on December 31, 2017 (thereby conforming to many provisions contained in P.L. No. 115-97). Based on existing state law provisions overall, the Department concludes that:

- For federal tax purposes, GILTI is treated similarly to Subpart F income; therefore, GILTI is considered nontaxable income for Kentucky income tax purposes;
- Because GILTI is considered nontaxable income for Kentucky income tax purposes, Kentucky will not allow the IRC Sec. 250 deduction; in addition, any expenses related to GILTI must be added back (with various estimation methods available under state law if the actual expenses cannot be determined); and
- GILTI must not be included in the computation of the sales factor for Kentucky corporate income tax purposes (or in the calculation of gross receipts for Kentucky’s limited liability entity tax which is based on the sales factor) as Kentucky does not include nontaxable income in the computation of the sales factor.

The Department additionally notes that “as of publication of this guidance, the Internal Revenue Service (IRS) has not released guidance or tax forms explaining how GILTI will be treated at the federal level,” and that once the IRS has released such information, specific guidance may be issued by the Department to explain how GILTI should be reported on the Kentucky corporation income tax return. Please contact us with any questions.

— Amber Rutherford (Nashville)
Senior Manager
Deloitte Tax LLP
amberrutherford@deloitte.com

**Income/Franchise:**

**New Jersey Tax Court Holds that Individual S Corp Shareholders Can’t Claim Credit for Certain Taxes Paid to Another State**

*Docket No. 011661-2016, N.J. Tax Ct. (8/17/18).* In a case involving New Jersey’s gross income tax (i.e., personal income tax), the New Jersey Tax Court (Court) recently granted summary judgment in favor of the New Jersey Division of Taxation (Division) that resident individuals could not claim additional credits for certain income taxes paid to another state (Pennsylvania) even though these taxpayers had paid tax on such income based on both New Jersey’s and Pennsylvania’s respective allocation formulas for income earned as shareholders from their S corporation. In doing so, the Court agreed with the Division that the New Jersey Legislature had specifically defined and delineated via statutes how New Jersey’s credit for income taxes paid to other states must be calculated, and that such calculation “does not necessarily guarantee, or is required to guarantee, that all out-of-state taxes are credited.” The taxpayers had unsuccessfully argued that the legislative intent for New Jersey’s credit for income taxes paid to another state is that so long as the credit does not erode the full amount of taxes due on income allocated to New Jersey, a credit generally is permissible against the state gross income tax assessed.

URL: [https://www.njcourts.gov/attorneys/assets/opinions/tax/11661-16opn.pdf?cacheID=usFQv58](https://www.njcourts.gov/attorneys/assets/opinions/tax/11661-16opn.pdf?cacheID=usFQv58)
Income/Franchise:
North Dakota State Tax Commissioner Addresses Treatment of 2017 Federal Tax Act’s International Tax Provisions, including Transition Tax, GILTI, FDII, and BEAT

Notice: Treatment of TCJA International Tax Provisions, N.D. State Tax Comm. (8/18). Commenting on how certain provisions of the federal 2017 Tax Act (i.e., P.L. 115-97) make “significant changes to the taxation of foreign-sourced income earned by US corporations and their foreign subsidiaries,” the North Dakota State Tax Commissioner has issued a notice describing how some of these provisions impact North Dakota business tax returns. The notice addresses the treatment for North Dakota tax purposes of Internal Revenue Code (IRC) Sec. 965 regarding the deemed repatriation of foreign dividends, IRC Sec. 951A involving global intangible low-taxed income (GILTI), IRC Sec. 250 involving foreign-derived intangible income (FDII), and IRC Sec. 59a regarding the base erosion anti-abuse tax (BEAT). The guidance generally applies to the 2017 and subsequent tax years. URL: https://www.nd.gov/tax/data/upfiles/media/tcja-guidance.pdf?20180821101923

Regarding the deemed repatriation of deferred foreign earnings, the notice explains that the underlying IRC Sec. 965 deduction will be treated the same as other federal deductions for dividends received and therefore must be added back to North Dakota taxable income – resulting in 100% of the IRC Sec. 965 inclusion amount being tentatively included in North Dakota apportionable income. Because these IRC Sec. 965 inclusion and deduction amounts are reported on the IRC Sec. 965 Transition Tax Statement, a copy of this federal statement must be filed with the North Dakota return when an IRC Sec. 965 inclusion amount is reported. The notice concludes that all taxpayers must treat the IRC Sec. 965 inclusion as Subpart F income, and that for North Dakota taxpayers filing a return using the worldwide combined reporting method, the IRC Sec. 965 inclusion attributable to a controlled foreign corporation (CFC) that is included in the combined report is deducted as an intercompany dividend elimination. For taxpayers filing a return using the water’s edge method, the notice concludes that 70% of the IRC Sec. 965 inclusion is deductible as a foreign dividend. Also, the “addback” of the federal dividends received deduction on the North Dakota return, Form 40, Schedule SA, Line 2 should be the sum of Form 1120, Line 29b and the IRC Sec. 965 deduction. Lastly on this topic, the notice explains that the federal election on the Transition Tax Statement to defer payments of the federal tax related to the IRC Sec. 965 provisions do not impact the filing or timing of payment of North Dakota tax. According to the notice, taxpayers that already have filed their 2017 North Dakota corporate income tax return and have not included such IRC Sec. 965 income must file an amended return to properly report that income and associated deduction.

Regarding the federal GILTI provisions under IRC Sec. 951A, the notice explains that North Dakota considers GILTI a foreign dividend that is included in the taxpayer’s federal taxable income. Both the GILTI and the deduction related to GILTI under IRC Sec. 250 are reflected in federal taxable income, which is the starting point for computing North Dakota taxable income. As such, the deduction related to GILTI under IRC Sec. 250 will be treated the same as other federal deductions for dividends received and must be added back to North Dakota taxable income – resulting in 100% of the GILTI being tentatively included in North Dakota apportionable income. Furthermore, the notice explains that all taxpayers should report GILTI as other foreign dividends are treated. Accordingly, for North Dakota taxpayers filing a return using the worldwide combined reporting method, the GILTI attributable to a CFC that is included in the combined report is deductible as an intercompany dividend elimination. For those taxpayers filing a return using the water’s edge method, the notice explains that 70% of the GILTI is deductible as a foreign dividend, and 30% of the GILTI is includable in the sales factor apportionment formula for taxpayers using the water’s edge filing method.
Regarding FDII, because it does not relate to a deduction of dividends received, the notice concludes that the amount is not included in the North Dakota addback of the federal dividends received deduction. Regarding BEAT, the notice concludes that it does not impact the computation of North Dakota tax as the BEAT does not affect federal taxable income. Please contact us with any questions.

— Ray Goertz (Minneapolis)  
Managing Director  
Deloitte Tax LLP  
rgoertz@deloitte.com  

Mark Sanders (Minneapolis)  
Manager  
Deloitte Tax LLP  
msanders@deloitte.com

Income/Franchise:
Oregon Supreme Court Holds that “Gross Receipts from Broadcasting” for Special Industry Apportionment Purposes Includes Interstate Broadcaster’s Receipts from Regular Business Transactions

Case No. S064698, Or. (8/16/18). In a case involving the appropriate amounts to include as “gross receipts from broadcasting” for purposes of calculating Oregon’s special industry “audience ratio” for interstate broadcasters for state corporate excise tax apportionment purposes, the Oregon Supreme Court (Court) concluded that the Oregon Tax Court correctly construed state statutes governing income-apportionment for interstate broadcasters so that these amounts generally include gross receipts from regular business transactions rather than just activities narrowly defined as “broadcasting.” In doing so, the Court upheld the Oregon Tax Court’s broader interpretation of “receipts from broadcasting” to include all receipts of an interstate broadcaster except for certain enumerated exceptions. The taxpayer in this case had unsuccessfully argued that most of its receipts for the tax years at issue arose from non-broadcasting activities (i.e., from activities other than transmitting one-way electronic signals) and therefore they should be excluded from its special industry “audience ratio” apportionment formula.


See forthcoming Multistate Tax Alert for more details on this case, as well as related taxpayer considerations, and please contact us with any questions.

— Scott Schiefelbein (Portland)  
Managing Director  
Deloitte Tax LLP  
sschiefeleibin@deloitte.com  

Anne-Marie Gorbett (Portland)  
Manager  
Deloitte Tax LLP  
agorbett@deloitte.com

Income/Franchise:
Utah State Tax Commission Issues Guidance on State Tax Treatment of IRC Sec. 965 Deferred Foreign Income

Notice: Utah Tax on Deferred Foreign Income, Utah State Comm. (8/15/18). The Utah State Tax Commission (Commission) had issued state tax guidance pursuant to certain provisions of the federal 2017 Tax Act (i.e., P.L. 115-97) and recently enacted state legislation [H.B. 2002; see State Tax Matters, Issue 2018-30, for more details on this new state law], which clarifies that deferred foreign income under Internal Revenue Code (IRC) Sec. 965 generally is subject to Utah corporate income tax. Accordingly, the Commission explains that corporate taxpayers having a federal tax liability under IRC Sec. 965(a) are also subject to tax on that income by Utah. To report such IRC Sec. 965(a) deferred foreign income, Utah corporate taxpayers must file form TC-20R and attach the “IRC 965 Transition Tax Statement;” they must pay the amount due by the due date of the 2017 return plus extensions. Form TC-20R does not provide taxpayers the opportunity to claim the federal subtraction under IRC Sec. 965(c). The Commission also explains that these filers may pay the Utah tax on deferred foreign income in installments over eight years; if making installments, the amount due for 2017 is 8%. Please contact us with any questions.

Sales/Use/Indirect:
Arkansas DFA’s Revenue Legal Counsel Comments on *Wayfair*, Explains that State Impact is Uncertain

*Revenue Legal Counsel Opinion No. 20180427, Ark. Dept. of Fin. & Admin., Revenue Counsel Legal Opinion (8/14/18).* Revenue Legal Counsel at the Arkansas Department of Finance and Administration (Counsel) has provided some comments in light of the US Supreme Court’s recent decision overruling *Quill’s* physical presence nexus standard [see previously issued Multistate Tax Alert for more details on the *Wayfair* case] – explaining that “its impact on Arkansas is uncertain.” Counsel notes that Arkansas law imposes sales tax liability for all sales of tangible personal property, specified digital products, digital codes, and taxable services, and that the relevant Arkansas imposition statute on its face “does not limit its application to sellers with a physical presence in Arkansas.” Nevertheless, Counsel explains that the Arkansas Department of Finance and Administration is “reviewing the exact requirements and actions to be taken regarding the *Wayfair* decision” [see *State Tax Matters*, Issue 2018-31, for details on some of the Department’s earlier post-*Wayfair* comments]. Furthermore, Counsel explains that Arkansas’ Bureau of Legislative Research “has indicated their opinion that legislation would be necessary to impose the collection duty on remote sellers” – with such a bill possibly being introduced in the 2019 legislative session. Lastly, Counsel states:


“The long-term effects of the *Wayfair* decision could also be complicated by the action (or inaction) of the United States Congress. I cannot fully state how the *Wayfair* decision will affect Arkansas, and I cannot, as you asked in your letter, give my opinion on whether the *Wayfair* decision is good for Arkansas.”

Please contact us with any questions.

— Michael Bryan (Philadelphia)  
Managing Director  
Deloitte Tax LLP  
mibryan@deloitte.com

— Rick Heller (Parsippany)  
Managing Director  
Deloitte Tax LLP  
rickheller@deloitte.com

— Collin Koenig (Kansas City)  
Manager  
Deloitte Tax LLP  
cokenig@deloitte.com

Sales/Use/Indirect:
Idaho State Tax Commission Reiterates July 1 Implementation Date of Remote Seller “Click-Through” Nexus Provisions; Has Contacted Some Remote Sellers

*News Release: Some out-of-state retailers required to collect Idaho sales tax, Idaho State Tax Comm. (8/15/18).* The Idaho State Tax Commission (Commission) reiterates [see *State Tax Matters*, Issue 2018-32, for its earlier comments] that Idaho’s recently enacted legislation [H.B. 578; see *State Tax Matters*, Issue 2018-13, for more details on this new law] – which expands the definition of “retailer engaged in business in the state” for state sales and use tax purposes to impose additional collection and remittance requirements on some “click-through” Internet sales in Idaho – went into effect on July 1, 2018. This new law provides that a retailer selling tangible personal property to Idaho customers generally is presumed to be engaged in business in Idaho if the out-of-state retailer generates annual referral sales of $10,000 or more through certain Idaho persons. The Commission explains that qualifying referrals can include a link
on a website, a written or oral presentation, or any other similar third-party purchase opportunity. The Commission also notes that it has contacted 500 out-of-state retailers about compliance with Idaho’s new law, and is carefully analyzing how the US Supreme Court’s recent *Wayfair* ruling affects out-of-state retailers making sales into Idaho. Please contact us with any questions.

**URL:** https://tax.idaho.gov/n-feed.cfm?idd=4199  
**URL:** https://legislature.idaho.gov/sessioninfo/2018/legislation/H0578/  

— Robert Wood (Seattle)  
Senior Manager  
Deloitte Tax LLP  
robwood@deloitte.com

**Sales/Use/Indirect:**  
**Minnesota Supreme Court Upholds Constitutionality of Subjecting Non-Resident Pharmacy to Legend Drug Tax, References *Wayfair* and other US Supreme Court Cases**

*Case No. A17-1991*, Minn. (8/15/18). The Minnesota Supreme Court (Court) held that Minnesota’s “Legend Drug Tax,” which is imposed under Minn. Stat. Sec. 295.52, subd. 4 (2016) and is one of several “MinnesotaCare” provider taxes, applies to an out-of-state non-resident pharmacy’s delivery of prescription drugs via common carrier to Minnesota-based patients and doctors. In doing so, the Court held that this application of Minnesota’s Legend Drug Tax to a non-resident pharmacy’s delivery of prescription drugs to Minnesota-based patients and doctors does not violate the Due Process or Commerce Clauses of the US Constitution. Addressing the Due Process Clause, the Court explained that the pharmacy purposefully directed its activities at Minnesota residents by filling prescriptions for legend drugs ordered by Minnesota healthcare providers, for Minnesota-based customers, and delivering the prescribed drugs to Minnesota-based customers. Minnesota-based customers could also use the pharmacy’s website to obtain refills of the prescribed legend drugs, and a representative based in Minnesota, acting on the pharmacy’s behalf, verified delivery locations to Minnesota-based customers. Addressing Commerce Clause issues, the Court referenced *Wayfair*, *Quill*, and other US Supreme Court decisions involving nexus. The Court reasoned that there is no internal consistency in this Minnesota taxation scheme as, for instance, a taxable person’s receipt of “legend drugs for resale or use in Michigan” is mutually exclusive of the taxable person’s receipt of “legend drugs for resale or use in Minnesota.” A dissenting opinion follows. Please contact us with any questions.


— Ray Goertz (Minneapolis)  
Managing Director  
Deloitte Tax LLP  
rgoertz@deloitte.com  

— Rick Heller (Parsippany)  
Managing Director  
Deloitte Tax LLP  
rickheller@deloitte.com  

— David Welliver (Minneapolis)  
Senior Manager  
Deloitte Tax LLP  
dwelliver@deloitte.com  

— Michael Bryan (Philadelphia)  
Managing Director  
Deloitte Tax LLP  
mibryan@deloitte.com

**Sales/Use/Indirect:**  
**South Carolina DOR Proposes More Draft Post-*Wayfair* Nexus Guidance Involving Remote Sellers, Provides October 1 Enforcement Date for Local Jurisdiction Tax Purposes**

*Revenue Ruling #18-x [DRAFT – 8/21/2018]*, S.C. Dept. of Rev. (8/21/18). In light of the US Supreme Court’s recent decision overruling Quill’s physical presence nexus standard [see previously issued Multistate Tax Alert for more
details on the *Wayfair* case], the South Carolina Department of Revenue (Department) has issued another draft revenue ruling addressing economic nexus thresholds for remote sellers [see *State Tax Matters*, Issue 2018-33, for details on the Department’s three other separate draft revenue rulings addressing economic nexus thresholds for remote sellers, online marketplace operators, and third-party marketplace sellers] – this latest one attempting to update guidance with respect to the criteria that must be met to require a retailer to remit a local jurisdiction’s sales and use tax when delivering the product to a purchaser located in another local jurisdiction (e.g., counties, municipalities, school districts). According to the draft ruling, it is the Department’s position that once a retailer has established nexus with South Carolina for sales and use tax purposes, the retailer has nexus for sales and use tax purposes with every local jurisdiction in South Carolina for which the Department administers and collects a local sales and use tax. As such, the retailer must remit local sales and use taxes for any local jurisdiction into which deliveries are made by, or on behalf of, the retailer. Similar to the Department’s three other separate draft revenue rulings on economic nexus, this draft revenue ruling states that the Department’s new policies will be implemented on a prospective basis and will only apply to deliveries made on or after October 1, 2018. Comments on this proposal are due to the Department by September 4, 2018. Please contact us with any questions.


— Jeff Corser (Charlotte)
Managing Director
Deloitte Tax LLP
jcorser@deloitte.com

Rick Heller (Parsippany)
Managing Director
Deloitte Tax LLP
rickheller@deloitte.com

Michael Bryan (Philadelphia)
Managing Director
Deloitte Tax LLP
mibryan@deloitte.com

Ryan Trent (Charlotte)
Manager
Deloitte Tax LLP
rtrent@deloitte.com

Multistate Tax Alerts

Throughout the week, we highlight selected developments involving state tax legislative, judicial, and administrative matters. The alerts provide a brief summary of specific multistate developments relevant to taxpayers, tax professionals, and other interested persons. Read the recent alerts below or visit the archive.


No new alerts were issued this period. Be sure to refer to the archives to ensure that you are up to date on the most recent releases.

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. In the United States, Deloitte refers to one or more of the US member firms of DTTL, their related entities that operate using the "Deloitte" name in the United States and their respective affiliates. Certain services may not be available to attest clients under the rules and regulations of public accounting. Please see www.deloitte.com/about to learn more about our global network of member firms.

Copyright © 2018 Deloitte Development LLC. All rights reserved.
36 USC 220506